

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WILLIE STEWART, JR.,

Petitioner,

v.

JAMES YATES, Warden,

Respondent.

Civil No. 08cv1177-BTM (NLS)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, but has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit, **no later than September 15, 2008**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee.

In addition, in accordance with Rule 4 of the rules governing § 2254 cases, the Petition is also subject to dismissal because Petitioner has failed to allege that his state court conviction or sentence violates the Constitution of the United States. Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State

1 court only on the ground that he is in custody in violation of the
2 Constitution or laws or treaties of the United States.

3 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.
4 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800
5 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
6 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of
7 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the
8 United States.” See 28 U.S.C. § 2254(a).

9 Here, Petitioner claims that the trial court applied state sentencing guidelines incorrectly
10 when it imposed a restitution fine that he has little chance of paying. (Pet. at 4.) In no way does
11 Petitioner claim he is “in custody in violation of the Constitution or laws or treaties of the United
12 States.” 28 U.S.C. § 2254.

13 Further, the Court notes that Petitioner may not simply be able to amend his Petition to
14 state a federal habeas claim and then refile the amended petition in this case. He must exhaust
15 state judicial remedies before bringing his claims via federal habeas. Habeas petitioners who
16 wish to challenge either their state court conviction or the length of their confinement in state
17 prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer,
18 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must
19 present the California Supreme Court with a fair opportunity to rule on the merits of every issue
20 raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at
21 133-34. Moreover, to properly exhaust state court remedies a petitioner must allege, in state
22 court, how one or more of his or her federal rights have been violated. The Supreme Court in
23 Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity
24 to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact
25 that the prisoners are asserting claims under the United States Constitution.” Id. at 365-66
26 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary
27 ruling at a state court trial denied him [or her] the due process of law guaranteed by the
28 Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.”

1 Id. at 366 (emphasis added). If Petitioner has raised his claim in the California Supreme Court
 2 as a federal claim he must so specify. The burden of proving that a claim has been exhausted
 3 lies with the petitioner. Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir.1981).

4 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death
 5 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ
 6 of habeas corpus by a person in custody pursuant to the judgment of a State court. The
 7 limitation period shall run from the latest of:

8 (A) the date on which the judgment became final by the
 9 conclusion of direct review or the expiration of the time for seeking
 such review;

10 (B) the date on which the impediment to filing an application
 11 created by State action in violation of the Constitution or laws of the
 United States is removed, if the applicant was prevented from filing
 by such State action;

12 (C) the date on which the constitutional right asserted was
 13 initially recognized by the Supreme Court, if the right has been
 newly recognized by the Supreme Court and made retroactively
 14 applicable to cases on collateral review; or

15 (D) the date on which the factual predicate of the claim or
 16 claims presented could have been discovered through the exercise
 of due diligence.

17 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

18 The statute of limitations does not run while a properly filed state habeas corpus petition
 19 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).
 20 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
 21 when its delivery and acceptance [by the appropriate court officer for placement into the record]
 22 are in compliance with the applicable laws and rules governing filings.”). However, absent some
 23 other basis for tolling, the statute of limitations does run while a federal habeas petition is
 24 pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

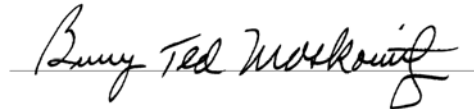
25 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
 26 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that
 27 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.
 28 Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas

1 relief because he has not stated a cognizable federal claim and has not alleged exhaustion of state
2 court remedies as to any cognizable federal claim.

3 If Petitioner wishes to proceed with this case, he must, **no later than September 15,**
4 **2008**, satisfy the filing fee requirement **and** file a First Amended Petition which cures the
5 pleading defects identified in this Order. The Clerk of Court shall send a blank Southern District
6 of California In Forma Pauperis Application and a blank Southern District of California
7 amended petition form to Petitioner along with a copy of this Order.

8 **IT IS SO ORDERED.**

9 DATED: July 9, 2008

10 
11 Honorable Barry Ted Moskowitz
12 United States District Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28